T. T. COWGILL ET AL.

IBLA 75-4 Decided April 7, 1975

Appeal from an order of Administrative Law Judge Dent D. Dalby dismissing an appeal from decisions of the Manager, Vale, Oregon, District Office, Bureau of Land Management, denying in part applications for grazing licenses (OR. 3-74-1).

Set aside and remanded.

1. Rules of Practice: Appeals: Service on Adverse Party

   An appeal to the Board of Land Appeals will not be dismissed for lack of service upon the adverse party where the adverse party is not specifically designated as such in the decision from which the appeal is taken.

2. Grazing Permits and Licenses: Appeals -- Grazing Permits and Licenses: Base Property (Land): Generally -- Res Judicata -- Rules of Practice: Appeals: Generally

   The doctrine of administrative finality, the administrative counterpart of res judicata, ordinarily bars reopening the issue of a permittee's class 1 base property qualifications resolved in a prior Departmental decision, but will not prevent modification of a decision to correct a conclusion inconsistent with the legal ruling of the case and apparently the result of an oversight as to the basis of the factual finding upon which it relies.

Ethel Cowgill Rayburn, A-28866 (September 6, 1962), modified.

APPEARANCES: Jack Dentel for T/C Hereford Ranch; Ethel C. Raburn and Theodore T. Cowgill, pro se. Riley C. Nichols, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Theodore T. Cowgill, T/C Hereford Ranch and Ethel C. Raburn appeal to this Board from an order by Administrative Law Judge Dent D. Dalby, dated May 30, 1974, granting a motion to dismiss appellants' appeals from decisions of the Manager of the Vale, Oregon, District Office, Bureau of Land Management (BLM), issued February 1, 1974, and amended February 20, 1974, which denied in part appellants' applications, filed pursuant to section 3 of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315b (1970), for licenses to graze livestock in the Cow Creek Unit of the Vale Grazing District.

The Government has moved to dismiss the appeal on the ground that appellants have failed to make service of the document containing their notice of appeal and statement of reasons either upon the Oregon State Director, BLM, who, the Government alleges, is an adverse party named in Judge Dalby's order, or upon counsel for the Government. Before considering the merits of the appeal, we shall dispose of the Government's motion to dismiss.

The pertinent regulation, 43 CFR 4.413, provides:

> The appellant must serve a copy of the notice of appeal and of any statement of reasons, written arguments, or briefs, on each adverse party named in the decision appealed from, in the manner prescribed in § 4.401(c), not later than 15 days after filing the document. Failure to serve within the time required will subject the appeal to summary dismissal as provided in § 4.402. * * * *

[1] Dismissal of an appeal for failure to comply with the requirement is not automatic, but is discretionary on the part of the Secretary. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). An appeal will not be dismissed for lack of service where the adverse party to be served is not specifically designated as such in the decision from which the appeal is taken. Jane S. Gaston, A-28443 (June 22, 1960); Albert P. Comer, A-28150 (April 15, 1960); Dredge Corp., 64 I.D. 368, 370 (1957).

Although the order of May 30, 1974, by the Administrative Law Judge states that the Oregon State Director has filed a motion to dismiss appellants' appeal from the decision of the District Manager, it does not identify the Director or any other party as

an adverse party to be served in the event of an appeal. Accordingly, the Government's motion to dismiss the appeal for want of service is denied.

We turn now to the merits of the case. The case arises from an adjudication of the class 1 base property qualifications of the Estate of T. R. Cowgill from whose grazing privileges appellants' privileges in issue are derived. By Departmental decision Ethel Cowgill Rayburn, A-28866 (September 6, 1962), 1/ the base property qualifications were determined to be limited by the commensurability rating of the base property, 4,110 animal unit months (AUM's). In determining the class 1 base property qualifications, the Department stated that the issue on appeal was whether the period of time base property is used to support livestock dependent on the range is the period the base actually was used during the priority years or, if there is a difference, the period of time which is determined under the range code in effect at that time, 43 CFR 161.5 (1960 Supp.), to be the proper season of use. The Department found that although a five-month season of use was then in effect, the range had actually been used for six months during the priority period. It concluded that in the absence of evidence to support a ruling that a six-month period of use was not proper use during the priority period, the six-month period could be used in determining the class 1 base property qualifications, even though awards of actual use must thereafter be limited to five months.

For some 12 years following the Department's decision, grazing privileges were awarded to appellants apparently on the basis of class 1 demand of 4,110 AUM's actual use plus 822 AUM's in suspended nonuse, or a total class 1 demand of 4,932 AUM's. The District Office's decisions, as amended in February 1972, reduced each appellant's proportionate share of privileges stemming from the T. R. Cowgill Estate. In effect, these proportionate reductions were of the total 822 AUM's which had been in suspended nonuse. The basis of the decision was that the 822 AUM's were in excess of the 4110 AUM's class 1 base property qualifications determined by the Department in the September 6, 1962, Rayburn decision and past licenses had been improperly issued in excess of those qualifications.

Upon appeal to the Administrative Law Judge, the Bureau's State Director filed a motion to dismiss appellants' appeal for the reason that the issue had been resolved by the previous Departmental decision which was a final decision. Judge Dalby granted that motion, and appellants have appealed.

1/ The name is misspelled in the 1962 decision. The correct spelling is Raburn.

Appellants challenge the Bureau's interpretation of the Rayburn decision and contend that District officials have for years interpreted the decision as recognizing class 1 base property qualifications of at least 4,932 AUM's. In these proceedings appellants have contended that higher base property qualification numbers could be reached. However, we reject those arguments. As the Department's decision in Rayburn correctly indicated, the extent of the base property qualifications depends upon the base property's commensurability rating since, as between its dependency by use and its commensurability rating, the lesser figure, the latter, must control. This conclusion is mandated by regulation 43 CFR 161.2(k)(3) (1960 Supp.), in effect at that time, now 43 CFR 4110.0-5(m)(3) (1974).

[2] Were there now no question as to the interpretation of the Rayburn decision and its application to appellants' grazing privileges, we would agree that the matter would be considered closed, and reopening the question of the class 1 base property qualifications would be barred by the doctrine of administrative finality, the administrative counterpart of res judicata. See United States v. Blythe, 16 IBLA 94, 101 (1974); L. M. Perrin, Jr., 9 IBLA 370, 373 (1973); Eldon L. Smith, 5 IBLA 330, 339-40, 79 I.D. 149, 152-53 (1972). However, the Bureau officials for some 12 years, apparently interpreted the decision as recognizing 4,932 AUM's class 1 base property qualifications, rather than 4,110 AUM's. When we read the Department's decision in Rayburn together with the Bureau of Land Management and hearing examiner decisions which led to that decision, it is apparent that there is an inconsistency in the Department's decision. Therefore, although we will not reopen the factual proceedings, we believe the decisions must be reexamined to determine what the proper conclusions should be, based on the actual factual findings and legal conclusions reached therein, and the Departmental decision shall be clarified accordingly. See United States v. Baranof Exploration & Development Co., 72 I.D. 212 (1965).

We have indicated that the Department held that a six-month period of use during the priority period was the proper period to be used in determining the base property qualifications rather than the five-month period ascribed by the Bureau. The hearing examiner concluded that the commensurability rating was 4,110 AUM's based on a Bureau survey of the productivity of the base lands and an absence of evidence that the base property is commensurate for not in excess of that figure. It appears that the Department accepted that figure without checking the basis for that determination. Prior to that conclusion the hearing examiner had referred to the five-month base property requirement established by 43 CFR 161.4 (1960 Supp.) and the Bureau's contention that the appellants could not be awarded in

excess of 4,110 AUM's because of that requirement and the Bureau's survey of appellants' base property. It is evident, therefore, that the hearing examiner's finding of commensurability at 4,110 AUM's was predicated upon the five-month period. It appears that the Department in ruling that a six-month period of use during the priority period could be used in determining the base property qualifications, did not reexamine the basis of the examiner's decision. While the Department criticized the Bureau's use of the five-month period as a limitation of class 1 rights, it stated that in effect, the decision of the examiner was being reinstated with respect to the six-month period of use, and the commensurability rating.

We agree with the statements of law in the Rayburn decision. We find, however, that the conclusion that the base property qualifications as limited by the commensurability rating was 4,110 AUM's, rather than 4,932 AUM's, was apparently made in error due to an erroneous assumption that it was based upon a six-month period of use for base property during the priority period, rather than the limiting five-month period subsequently prescribed. The 4,110 AUM's number divided by the five-month period equals 822 AUM's per month. By properly applying the six-month period of use on the public domain, 822 X 6, the class 1 base property qualification of 4,932 AUM's is reached. We note that as appellants had been allowed the 822 AUM's in suspended nonuse, their class 1 base property qualifications were not adversely affected until the decisions were rendered, from which the present appeal is taken. The Bureau may have been justified in concluding from express language in one paragraph of the Rayburn decision that the 4,110 number rather than the 4,932 number was the correct class 1 base property qualification. Nevertheless, in the absence of anything which would show that the original hearing examiner's decision was based upon a six-month base property basis rather than a five-month period, the Rayburn decision is modified to conform the conclusion as to the class 1 base property qualification with the legal conclusion reached therein.

Accordingly, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the order appealed from is set aside, the decision Ethel Cowgill Rayburn, A-28866 (September 6, 1962), is modified to show the class 1 demand base property qualification as 4,932 AUM's and the case is remanded for action consistent with this decision.

Joan B. Thompson
Administrative Judge

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We concur:

Martin Ritvo
Administrative Judge

Douglas E. Henriques
Administrative Judge